No. 1196

In the Supreme Court of the United States

OCTOBER TERM, 1944

ASHBACKER RADIO CORPORATION, A MICHIGAN CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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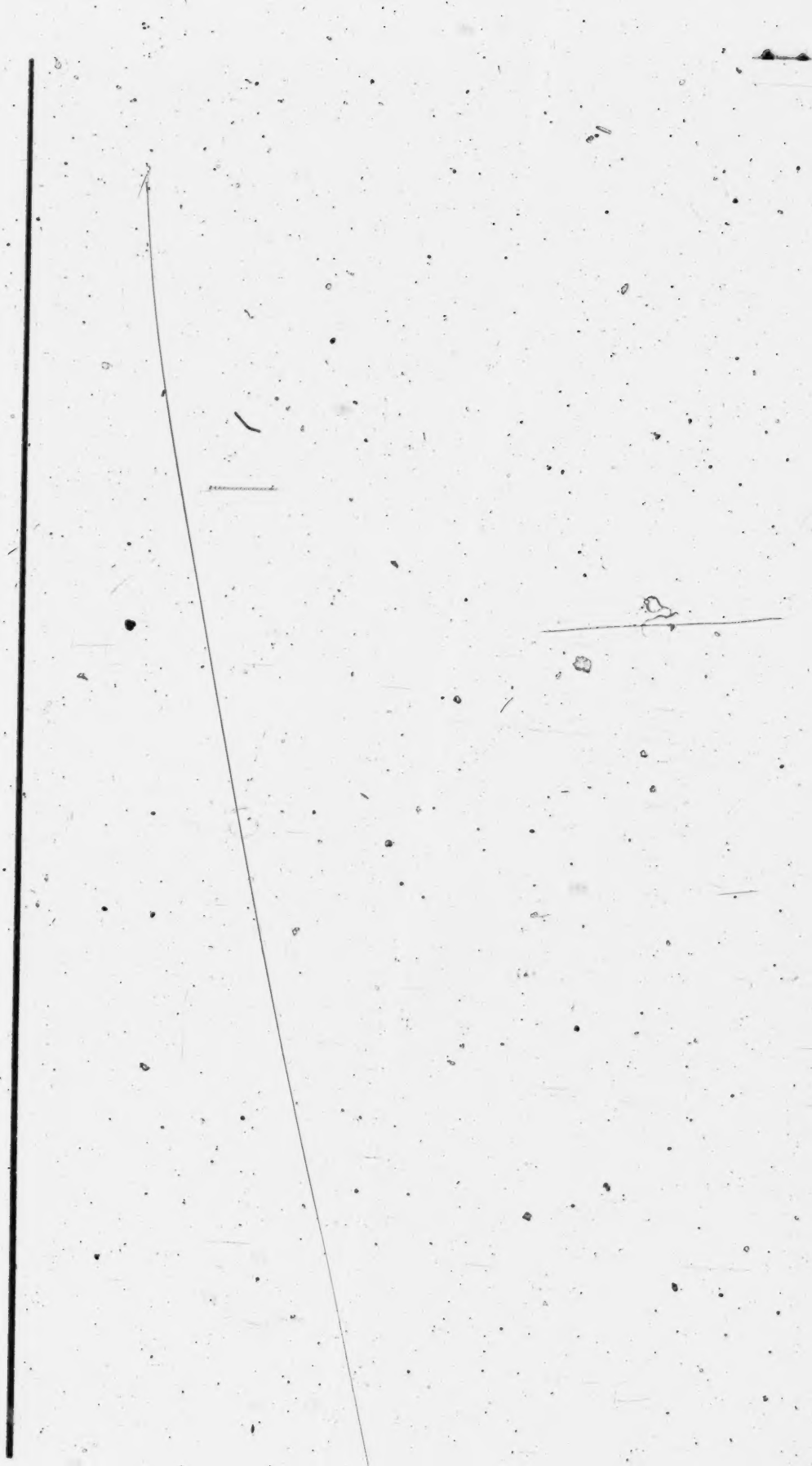

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OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia (R. 39–40) was entered without an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 24, 1945 (R. 39–40). The petition for

a writ of certiorari was filed on April 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

When the Federal Communications Commission grants one of two competing applications for the same frequency in the same area and designates the other application for hearing, may the applicant whose application has been designated for hearing appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) (2) of the Communications Act of 1934, as amended, as a person aggrieved or whose interests are adversely affected by the action of the Commission?

STATUTE INVOLVED

The relevant portions of the Communications Act of 1934, as amended, are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

On March 20, 1944, the Fetzer Broadcasting Company filed with the Federal Communications Commission an application requesting authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kilocycles with 250 watts power, unlimited time. On May 5, 1944, petitioner, the Ashbacker Radio Corpora-

tion, filed an application for permission to change the operating frequency of its Station WKBZ, Muskegon, Michigan, from 1490 kilocycles to 1230 kilocycles. The applications were mutually exclusive because simultaneous operation on 1230 kilocycles at Grand Rapids and Muskegon would result in intolerable interference to both stations. Upon an examination of the Fetzer application, and all data submitted therewith, the Commission was able to determine that a grant of the application would be in the public interest. Upon an examination of the petitioner's application and supporting data, the Commission was unable to conclude that the public interest would be served by a grant. Accordingly, pursuant to Section 309 (a) of the Communications Act of 1934, as amended (47 U. S. C. 309 (a), Appendix, *infra*, p. 13), the Commission on June 27, 1944, granted the Fetzer application and designated petitioner's application for hearing.[1] The Ashbacker Radio Corporation then filed a petition for hearing, rehearing, or other relief on July 17, 1944, directed against the grant of the Fetzer construction permit application. The petition was denied by the Commission on September 12, 1944, with an opinion (R. 8–14) setting forth the basis for denial. (R. 8–9, 13.)

[1] The hearing, which was originally scheduled for October 3, 1944, was postponed on motion of the applicant, Ashbacker Radio Corporation (R. 14, 19).

In its opinion denying the petition, the Commission, after an examination of both applications and the supporting data, pointed out that whereas a grant of the Fetzer application would result in bringing a new service to 202,800 listeners at nighttime and 238,800 listeners during the daytime, petitioner's application would only increase its listening audience by 3,972 listeners at nighttime and 9,815 listeners during the daytime. Petitioner's present daytime audience is 97,525 and its nighttime audience is 77,657. (R. 10.) The opinion also disclosed that while a grant of the Fetzer application would not result in interference to any other station, a grant of petitioner's application would involve objectionable interference to about five percent of the primary daytime service of Station WHBY at Appleton, Wisconsin (R. 11). The Commission stated that petitioner was not deprived of an opportunity for hearing but rather would have ample opportunity at the scheduled hearing to show that its operation would be in the public interest and would better serve the public interest than would a grant of the Fetzer application (R. 13). Other objections raised by petitioner to a grant of the Fetzer application were discussed and disposed of in the Commission's opinion (R. 8–14).

Upon the denial of its petition for hearing, rehearing, or other relief, petitioner, asserting that it was a "person aggrieved or whose interests are

adversely affected" by the decision of the Commission, within the meaning of Section 402 (b) (2) of the Communications Act (47 U. S. C. 402 (b) (2), Appendix, *infra*, pp. 13–14), filed in the United States Court of Appeals for the District of Columbia a notice of appeal from the grant of the Fetzer construction permit application (R. 1–4). The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain the appeal (R. 18–24). This motion was granted without opinion on January 24, 1945 (R. 39–40).

ARGUMENT

The question in this case is whether petitioner has any standing to appeal from the Commission's order granting the Fetzer application and designating petitioner's application for hearing. It should be noted at the outset that petitioner does not predicate its standing to appeal upon any possible interference between the proposed operation of the Fetzer station and the operation of petitioner's station on its present frequency, and in fact no such interference would be possible since the stations operate on widely separated frequencies. Nor does petitioner base its standing upon any possible competitive injury resulting to its station in Muskegon, Michigan from the operation of the Fetzer station in Grand Rapids, Michigan. Accordingly, petitioner's reference (Pet. 8–9) to *Federal Communications Commission* v.

Sanders Brothers Radio Station, 309 U. S. 470; *Federal Communications Commission* v. *National Broadcasting Company, Inc.* (*KOA*), 319 U. S. 239; and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, is inapt.

Petitioner seeks to base its standing to appeal upon its status as an applicant for the same facilities granted to Fetzer. Its position, in substance, is that its proposed operation would be in the public interest and would better serve the public interest than the operation of the Fetzer Company and that a grant of the Fetzer application in some way deprives petitioner of a full opportunity to prove its position and obtain a grant of its application. This position is unsupported by the facts and disregards the procedural requirements of the Communications Act concerning the granting or denial of applications.

Under Sections 307 (a) and 309 (a) of the Communications Act (Appendix, *infra,* p. 13), the Commission is permitted to grant only those applications which it finds would serve public interest, convenience, or necessity. If the Commission can conclude from an examination of an application and supporting data that public interest will be served by a grant of the application, it may grant the application without a hearing; otherwise it must designate the application for hearing. This procedure was followed here. The Commission

granted the Fetzer application because it was able to determine from an examination of the application that public interest would be served by a grant. Petitioner's application has been designated for hearing pursuant to Section 309 (a) of the Communications Act and will be granted as required by law if upon the basis of the hearing record it appears that a grant would be in the public interest. Any advance assumption by petitioner that it will not be accorded its full legal rights at the hearing or thereafter is unwarranted and cannot excuse disregarding appropriate administrative remedies before recourse to the courts. Appeal to the courts by petitioner at this juncture is premature and will remain so until petitioner has availed itself of the administrative hearing for which its application has been designated and until the Commission, on the basis of that hearing, has had an opportunity to grant or deny petitioner's application. *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41; *United States* v. *Illinois Central Railroad Co.,* 244 U. S. 82.

A reference to the hearing for which petitioner's application has been designated will serve to emphasize the need for the scheduled hearing prior to resort to the courts. At that hearing petitioner must show the Commission, first, that there are no factors which would preclude a grant of its applica-

tion if there were no competing application and, second, that a grant of its application would better serve the public interest than would a grant of the competing Fetzer application. With respect to the first question, the Commission's opinion disposing of petitioner's petition for rehearing in this case pointed out that one of the facts disclosed by an examination of petitioner's application is that its proposed operation will cause objectionable interference in a portion of the daytime listening area of Station WHBY, Appleton, Wisconsin (R. 11). Consequently, before the Commission can conclude that a grant of petitioner's application would be in the public interest, even if there were no Fetzer application, petitioner will have to show the Commission at the hearing, either that its proposed operation would not cause interference to Station WHBY, Appleton, or that despite such interference it would be in the public interest for Station WHBY to suffer a curtailment in its coverage in the light of the advantages which the proposed operation of petitioner's station would produce. Moreover, it is clear that unless an appropriate showing is made on this and other issues that a grant to petitioner would be in the public interest, the Commission could not grant petitioner's application whether or not a conflicting application were on file, and there would obviously be no basis for complaint by petitioner against the grant to Fetzer. Under

such circumstances the facilities granted to Fetzer would in no event have been available to petitioner, and petitioner could not be heard to complain that someone else was granted facilities it was not eligible to receive.

Even if petitioner succeeds in showing to the Commission that a grant of its application would otherwise be in the public interest, it will still be required to show that a grant of its application would better serve the public interest than a grant of the Fetzer application. Such a showing would have to be made whether the Fetzer application was still pending or had been granted. Any fear expressed by petitioner (Pet. 10) that the authorization to Fetzer results in an additional burden of proof being placed upon it is an unwarranted anticipation concerning the action that the Commission will take at the hearing. The burden will not be greater, for the Commission has specifically stated in its opinion denying the petition for hearing, rehearing or other relief, that at the hearing

> * * * petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company*

(WEEU), Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association* (WWJ), Detroit, Michigan, 8 FCC 552 (1941); In re: *Meroed Broadcasting Company* (KYOS), Merced, California, 9 FCC 118, 120 (1942). (R. 13.)

It is thus clear that the question whether petitioner's application should be granted involves basic problems upon which the Commission has not acted and which must be acted upon by the Commission before they may properly be raised on appeal to the courts. If the Commission concludes on the basis of the scheduled hearing that petitioner's application is in the public interest, and would better serve public interest than a grant of the Fetzer application, the Commission will be required to grant the application. In that case there would be no cause for petitioner to seek judicial relief. If, on the other hand, the Commission is unable to reach a determination in favor of the petitioner it will deny the application. At that time petitioner will have ample opportunity to appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) (1) of the Communications Act (Appendix, *infra*, pp. 13–14) and to urge there any errors that it believes the Commission may have committed. Moreover, if petitioner is then unsuccessful in the Court of Appeals, a petition to this Court for a writ of certiorari would be timely. An appeal, however, before the Commis-

sion has had an opportunity to take final action on petitioner's application is premature. *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41; *United States* v. *Illinois Central Railroad Co.,* 244 U. S. 82.

Moreover, petitioner's contention that in all cases of competing applications each applicant is entitled to a hearing before either application is granted is unsound from a practical standpoint as well as a legal standpoint. In a field as dynamic as radio broadcasting, applications are constantly being filed, many of which are competing or mutually exclusive. In many instances the Commission is able to determine from an examination of the application that the application is meritorious or that it is palpably without merit or, in some instances, that the application was filed for the purpose of preventing or delaying the granting of other applications. Under petitioner's contention the Commission would be required to hold a hearing at any time that two or more applications were in conflict and regardless of the merits or lack of merits of one of the competitive applications. This would mean that licensing of new stations would be effectively delayed and would greatly encourage the filing of "strike applications" by persons standing to gain competitive advantages from the delay in the licensing of competing facilities.

CONCLUSION

The decision below is correct, and no conflict is presented. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
WALTER J. CUMMINGS, JR.,
Attorney.

ROSEL H. HYDE,
General Counsel,
HARRY M. PLOTKIN,
Assistant General Counsel,
JOSEPH M. KITTNER,
Counsel,
Federal Communications Commission.

MAY 1945.

APPENDIX

The relevant portions of the Communications Act of 1934 (48 Stat. 1064), as amended, are as follows:

SEC. 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act. (47 U. S. C. 307 (a).)

SEC. 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe. (47 U. S. C. 309 (a).)

SEC. 402 (b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio

station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission. (47 U. S. C. 402 (b).)

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